IN THE

SUPREME COURT

OF THE

UNITED STATES

WALTER S. MCMICHAEL, ET AL,

Plaintiffs in Error and Appellants.

vs.

SAMUEL MURPHY, ET AL.

Appellees.

No. 166

October Term, 1904.

BRIEF OF DEFENDANTS IN ERROR.

The relief sought in this case is the declaration of a resulting trust in favor of the appellants and against the appellees. The appellants base their claims to the relief prayed for as the heirs of one William T. McMichael, deceased, and upon proceedings had in the Department of the Interior and its subordinate bureau, affecting the Southwest Quarter (SW. ¼) of Section Twenty-seven (27), Township Twelve (12), North of Range

Three (3) West of the Indian Meridian, in the Oklahoma City Land District. Title to this tract of land was derived by the principal defendant, Samuel Murphy, under the homestead laws of the United States, a final receipt being issued on the 20th day of May, 1897, and patent being thereafter issued.

The original petition in the court below sets out the final decision of the Secretary of the Interior adverse to the said William T. McMichael, and alleges and asserts that there were certain errors of law in said decision, that the law applicable to the facts had been misconstrued and misapplied, and attempts to show that under the law properly administered the land in contest should have been awarded to the complainant, McMichael.

The facts as found by the Secretary in the proceeding before the Interior Department are final, conclusive and binding upon the parties, and the courts will not undertake to retry such questions of fact.

Lee vs. Johnson, 116 *U. S.*, 48.
Johnson vs. Towsley, 13 *Wall*, 72.
Marquez vs. Frisbie, 101 *U. S.*, 473.
Quinby vs. Conlan, 104 *U. S.* 420.
Baldwin vs. Starks, 107, *U. S.*, 463.

The findings of fact made by the Secretary and printed on pages 31, 32, 33, 34, 35 and 36, are summarized on page 62 of the record herein, by the Supreme Court of the Territory of Oklahoma, and said statement is so full and succinct that counsel will not repeat it here.

We think that but two propositions are presented under the record.

First, did McMichael gain any rights under the homestead laws of the United States by his forcible intrusion upon the land in question while it was covered by the uncancelled entry of White?

Second, does not the petition of the appellants originally filed in the District Court of Oklahoma County, show that such action was barred by former adjudication and should not the trial court have sustained the demurrer on this gound also, and under the general demurrer, even if the special ground of demurrer was not recognized by the statute?

The findings of fact by the Secretary concerning the settlement of McMichael were as follows, to-wit:

"McMichael based his claim upon his alleged settlement on the tract in May or June, 1889, while it was covered by White's homestead entry; that White, Blanchard and Cook were all disqualified by reason of having entered the Territory during the prohibited period; that White's entry was therefore void; McMichael the first qualified settler on the tract, and that White's relinquishment was filed because of his protest affidavit, filed in August, 1889, and that Murphy's entry is void because in violation of rule of practice No. 53.

Holt based his claim on his application filed March 11, 1890, four days after the decision of your office, holding White's entry for cancellation, and before appeal was taken therefrom.

Murphy's claim is based solely on his entry, made November 29, 1890, on the filing of White's relinquishment.

Although White had entered the Oklahoma country during the prohibited period, yet his homestead entry was prima facie valid, its invalidity had to be established by extraneous evi-

dence and a judgment as to its illegality pronounced by a competent tribunal. Had that never been done the tract covered by said entry would have remained forever segregated from the public domain; so far at least as the unquestioned legality of the entry itself could accomplish that fact, hence it cannot be regarded as void but voidable only. If voidable only, White's entry segregated the land so long as it remained of record. Hence he was entitled to its possession, it being exempt from further settlement or entry, until his entry was cancelled or declared forfeited.

McMichael's settlement on the tract in question in May or June, 1889, while it was covered by the homestead entry of White gave him no rights whatever as against either White or the Government. McMichael was not on the tract when White's entry was cancelled. He cannot be heard to say that he was deprived of any right on account of his ejectment by White because he had none to lose. He was a trespasser on the tract and White had a right to eject him therefrom.

Hence he can acquire no right whatever by virtue of his alleged settlement. Had White permitted him to remain on the tract, and had he been residing there when White's entry was cancelled a different question would be presented. When White therefore filed his relinquishment November 29, 1890, McMichael had no right or legal claim whatever to said tract, unless that relinquishment was caused by McMichael's protest filed August 31, 1889, which would have entitled him to the preference right of entry. This brings us to the examination of that question."

The land department held on the above statement of facts, that the claimant, McMichael, had gone upon land segregated by the entry of White and in the lawful occupation and possession of White, and that such settlement was accomplished by a forcible trespass and that as a matter of law it conferred no right of homestead upon McMichael; that McMichael was rightfully ejected by the only authority then having jurisdiction in Oklahoma, to-wit: the military arm of the Government, and that his resumption of residence after the interposition of Murphy's rights acquired by homestead entry at the proper land office, did not relate back to McMichael's initial acts and make him a settler upon the land at the time White's entry was relinquished.

It is contended by the appellants that this conclusion of law on the part of the Secretary of the Interior was wrong. It is urged by appellants that the homestead entry of White was void ab initio and did not segregate the land so as to preclude the settlement of McMichael for the reason that White had entered the Oklahoma Country in disregard of the Act of Congress, approved March 2, 1889, and the President's Proclamation thereunder, of date March 23, 1889, which provided that said lands should not be open to settlement and entry until 12 o'clock noon, of April 22, 1889, and provided as a penalty for such violation that "no person violating this provision shall ever be permitted to enter these lands or acquire any right thereto."

This theory of the appellants that a homestead entry prima facie valid did not operate to segregate lands therein embraced, from the public domain, was carefully considered by the Supreme

Court of the Territory of Oklahoma, in its opinion in this case, and was one of the two specific propositions of law decided by the court. The decisions of the Supreme Court of the United States cited in the opinon of the Supreme Court of Oklahoma, are final and conclusive on the proposition that homestead entry once made upon public land of the United States under the provisions of Sections 2289 and 2290 of the Revised Statutes of the United States segregates such lands until finally cancelled, and unless the Act of March 2, 1889, operates to change the ordinary rule with respect to the effect of a homestead entry, these decisons by this court, apply to the case at bar.

See Chotard vs. Pope, 12 *Wheaton*, 586.
Wilcox vs. Jackson, 13 *Peters*, 493.
Carroll vs. Safford, 3rd *Howard*, 441.
Witherspoon vs. Duncan, 4th *Wall.*, 210.
Pacific R. R. Co. vs. Dunemeyer, 113 *U. S.*, 620.
Hastings & Dakota R. R. Co. vs. Whitney, 132 *U. S.*, 357.
Sturr vs. Beck, 133 *U. S.*, 541.
Sioux City & Iowa Falls vs. Griffey, 143 *U. S.*, 40.
Sioux City & Iowa Falls R. R. Co. vs. Griffey, 143, *U. S.*, 40.
Whitney vs. Taylor, 158, *U. S.*, 65.

The land department of the United States has repeatedly passed upon the same question and has in all cases held that a homestead entry prima facie valid segregates the tract of land therein described, until such entry is cancelled, either by relinquishment or by the Government.

See Graham vs. Hastings & D. R. R. Co., 1st *L. D.*, *p.* 362.
Whitney vs. Maxwell, 2nd *L. D.*, *p.* 98.

Seary vs. Manuel, 12th L. D., p. 345.
Vidal vs. Bennis, 22nd L. D., p. 124.
Cowles vs. Huff, 24th L. D., p. 31.

In Hodges vs. Colcord, 193 U. S., pages 191-193, (Vol. 48, Law Ed. Pages 677-679) this court passes squarely upon this identical proposition, and in the body of said case cites and approves the decision of the Secretary in McMichael vs. Murphy, which appellants attack by this proceeding. In the body of the case, the court says: "But it is unnecessary to multiply quotations. The entry of Gayman, though ineffectual to vest any rights in him, and therefore void as to him, was such an entry as prevented the acquisition of homestead rights by another until it had been set aside."

It appears to be thoroughly well settled by the decisions of this court that the remaining proposition decided by the Supreme Court of the Terrtory of Oklahoma, in the case at bar, was correctly decided by said court. This proposition was stated in the syallabus of said case as follows: (Page 62 of the record.)

"One who makes settlement on a tract of land while it is covered by the homestead entry of another, is a mere intruder, a naked, unlawful trespasser, and no right either in law or equity can be founded thereon."

In the case of Atherton vs. Fowler, 6th Otto, pages 513-520, the Supreme Court of the United States held that,

"1. No right of pre-emption can be established by a settlement and improvement on public lands where the claimant has

obtained possession by breaking into the enclosure of one who has already settled upon, improved and enclosed the same land.

"2. Such an intrusion, although made under pretense of pre-empting the land, is but a naked, unlawful trespass, and cannot initiate a right of pre-emption."

In the case of Hosmer vs. Wallace, this court cited and approved Atherton vs. Fowler, and says that,

"The right to make a settlement is to be exercised on unsettled land; the right to make improvements is to be exercised on unimproved land; and the right to erect a dwelling house is to be exercised on vacant land. None of these things can be done on land when it is occupied and used by others."

In Quinby vs. Conlan, 104 U. S., 420-427, the court says:

"Syllabus. A settlement cannot be made upon public land already occupied. As against existing occupants the settlement of another is ineffectual to establish a pre-emptive right."

Of like tenor are the decisions of the Land Department.

See Hudson vs. Docking, 4th L. D., p. 501.
Turner vs. Bumgardner, 5th L. D., p. 377.
Dutcher vs. Tillinghast, 13th L. D. p. 209.
Lewis vs. Nuckolls, 18th L. D., p. 326.
Tustin vs. Adams, 22nd L. D., p. 266.

It appears evident that McMichael gained no right by his settlement on the land in controversy, under the facts found by the Secretary and in the light of the decisions before cited, and inasmuch as the Secretary of the Interior also found that Mc-

Michael was not entitled to the status of a contestant under the second section of the Act of May 14,1880, the plaintiffs are in no condition to complain of the action of the Land Department in awarding a patent to Murphy.

"To entitle a party to relief in equity against a patent of the Government, he must show a better right to the land than the patentee. It must appear by the law properly administered, that title should have been awarded to the claimant."

Sparks vs. Pierce, 115 *U. S.*, 408.
Bohall vs. Dilla, 114 *U. S.*, 47.
Lee vs. Johnson, 116 *U. S.*, 48.

Inasmuch as McMichael gained no vested right by the residence and improvement founded upon his forcible intrusion, in the first instance, when the land was covered by the entry of White, and in the second instance, after the land had been segregated by the entry of Murphy, his bill shows a fatal lack of equity.

Parker vs. Lynch, 7th *Oklahoma*, 634 (56th *Pac. Rep.* 1081.)

The appellees also urge that the general demurrer filed in this case, should have been sustained by the trial court and the Supreme Court of the Territory of Oklahoma, for the reason that the petition of the plaintiff in the court below, as amended by order of the court, shows that this action is fully barred by former adjudication. The petition of the plaintiff, William T. McMichael, in the court below, as amended, is found on pages 25 to 54 inclusive.

Exhibit "A" attached to said petition, found on page 46, being the suit of Ewers White in ejectment for the possession of 120 acres of this land, and exhibit "E", found on page 50 of the record, being a suit in ejectment by Samuel Murphy against McMichael for the possession of the remaining 40 acres, together with the copies of the journal entries in both of said cases, showing final judgment in ejectment in favor of the plaintiffs in both suits, give ample foundation for the position taken by counsel, that the estoppel by said former adjudication appears plainly upon the face of plaintiff's petition. Where this is so the defense may be made by demurrer.

See Vol. 9, page 13, Enc. Plead. & Practice, Greenup et al. vs. Crooks et al., 50th Ind., pages 410-422.

This case cites and approves former holdings of the Supreme Court of Indiana of like effect.

See Trimble vs. the State, 4th Blackf. 435.
Sammons vs. Newman, 27th Ind., 508.
German Mut. Ins. Co. vs. Grim, 32nd Ind., 249.

In Williams et al., vs. Cheatham, the Supreme Court of Georgia made a similar holding. (25 S. E. R. p. 698.)

See Davis vs. Hall, 4th Jones Eq. (N. Car.) page 403 ~~(25 S. E. Rep. 698.~~

Both of the petitions plead by McMichael in the court below contained the statutory averments in ejectment cases, found in Article 24, page 1106, Vol. 1, Wilson's Annotated Statutes of Oklahoma Territory. The whole code of civil procedure of

Oklahoma having been adopted from Kansas; the interpretation placed upon said code by the Supreme Court of Kansas is also adopted, and under the rule laid down by the Kansas Supreme Court, any defense either legal or equitable may be raised under a general denial by the defendant in ejectment suit.

Clayton vs. School District, 20 *Kans.*, 256.
Hall vs. Dodge, 18 *Kans.*, 277.

It is immaterial whether McMichael did in fact plead as a defense the particular cause of action in equity set up in the suit at bar, but it is sufficient if he might have done so.

The dates of these actions in the District Court brought against McMichael in ejectment, are respectively, November 2, 1809, and January 27, 1808, and the allegations of plaintiff's petition in the case at bar are that Samuel Murphy acquired title to said land on the 20th day of May, 1807, and it thus appears that McMichael had the same pretended title when these two actions in ejectment were begun and concluded, that he now attempts to set up as a cause of action in the case at bar.

The Supreme Court of Kansas has repeatedly held that a general finding and judgment in an action of ejectment concludes a party on the question of title and prevents him from thereafter asserting a claim of title from whatever source it comes, which he had, pending the action and prior to the judgment.

See Peterson vs. Albach, 32 *Pac.*, 917.
Hentig vs. Redeu 26, *Pac.*, 701.

See also Redden vs. Metzger, 26 Pac., 689.

County Commissioners vs. Welch et al., 20 Pac., 483.

See also the decisions of the Supreme Court of the United States in the following cases:

Aurora vs. West, 7th Wall, 82.

Washington A. & G. Steam Packet Co. vs. Sickles, 24 Howard, 333.

Stockton vs. Ford, 18th Howard, 418.

The only questions which could have been decided in the former suits in ejectment was the title of the plaintiffs as against the title claimed by the defendant there, plaintiff in the case at bar, and as we have already shown the common law rule in ejectment cases, that the verdict and judgment in ejectment is not conclusive as in other actions, is modified by the rule applicable to the Oklahoma Statute under the decisions of the Supreme Court of the State of Kansas, supra.

For these reasons counsel urges that the decision of the Supreme Court of the Territory sustaining the demurrer, was correct and should be affirmed by this court.

Respectfully submitted,

J. H. EVEREST,

Attorney for Defendants in Error.